Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

LEEVAN SANDS, et al.,
Petitioners,

v.

United States Department of Homeland Security,
Citizenship and
Immigrations Services, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals of Florida
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erred by failing to respond to or address the main arguments of the Petitioners, to wit:

a. The Petitioners (the class action Plaintiffs/Appellants below) alleged in their pleadings at the district court (Second Amended Complaint , Appendix A, pgs. 1-5) and also in their brief and reply brief that the class action Petitioners are exempt from the 8 U.S.C. §1252 (a)(2)(B)(ii) jurisdiction bar based upon the holding in *McNary v. Haitian Refugee Center, Inc.* 498 U.S. 479 (1991).

b. Congressional intent and statutory construction make it clear that Congress did not intend to disenfranchise a class or group, therefore, the class action Petitioners are entitled to judicial process.

2. Should the conflict in the Circuits between the Ninth and Eleventh be addressed by the Supreme Court, to wit:

a. Fourteen of the class action /group of Petitioners had their I-140 approvals revoked by the Respondents. There is a conflict in the Circuits between the Ninth and the Eleventh. The Eleventh holds that all I-140 revocations (even the fourteen that are alleged to be the result of targeting and unlawful acts) are discretionary decisions and, therefore, bared from judicial review under 8 U.S.C. §1252 (a)(2)(B)(ii).

b. The Ninth Circuit case of *Ana International, Inc., v. Way* 393 F. 3d 886 (9th Cir. 2004) holds that I-140 revocations are not purely discretionary decisions and are, therefore, not barred from judicial review.

PARTIES TO THE PROCEEDING BELOW

Petitioners Leevan Sands, et al. were Plaintiffs/Appellants in the proceeding below. Respondents United States Department of Homeland Security, et al., were Defendants/Respondents in the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI

Leevan Sands, Olympic bronze medalist, 2008, respectfully petitions this Court to issue a writ of certiorari to the Court of Appeals of Florida for the Eleventh Circuit to review its judgment affirming the district court's dismissal of his class action complaint for want of subject matter jurisdiction.

OPINIONS BELOW

The district court of Miami held against the Petitioners (the class action Plaintiffs/Appellants below) in an unpublished opinion in the case of *Leevan Sands, et al., v. United States Department of*

Homeland Security, et al., No. 08-15370. The Court of Appeals affirmed.

JURISDICTION

The order of the United States Court of Appeals for the Eleventh Circuit was entered on January 26, 2009 and this Petition for a Writ of Certiorari was timely filed.

STATEMENT OF THE CASE

Petitioner, Leevan Sands, Olympic bronze medalist in track and field, was lead Plaintiff for a class or group of amateur athletes that filed a class action Complaint in Miami, Florida on May 9, 2008. The allegations in the Compaint mirrored the holding in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991). The class action member athletes numbered over fifty and fell into three groups; one group had their I-140 applications denied; another group that had received I-140 approvals were threatened with revocation; and the third group consisting of fourteen extraordinary amateur athletes in swimming and track and field had their I-140 approvals revoked. The fourteen revocations were very troubling as the "orders" of revocation were in direct conflict to the plain language of the statute under which the I-140 applications were filed, to wit: Immigration and Nationality Act, §203 (b)(1)(A).

The fourteen revocations formed a pattern of abuse that the class members athletes alleged was unlawful targeting. All would have been well as the

district court proceedings would have assured the fifty-plus class members judicial process. However, the 8 U.S.C. §1252 (a)(2)(B)(ii) jurisdictional bar raised its ugly head. The district court dismissed the class action Complaint as bared by 8 U.S.C. §1252 (a)(2)(B)(ii) and the Circuit Court affirmed.

The district court failed to find that if the plain language and the meaning of the statute is evident and the "intent of Congress is clear, that is the end of the matter." (see: *Scheerer v. United States Att'y Gen.*, 455 F. 3d 1311, 1318-19 (11th Cir. 2006)) The plain language of the statute is clear in its intent to bar jurisdiction only for a singular decision or action and does not bar class action challenges. The court's finding that the 8 U.S.C. § 1252(a)(2)(B)(ii) jurisdictional bar precludes judicial review of the denial and revocation of the Petitioners' I-140 applications is flawed. The district court's reliance on *Gringberg v. Swacina*, 478 F. Supp. 2d 1350, 1352 (S.D. Fla. 2007) is misplaced in that *Gringberg* involved individual plaintiffs and not a group or class of plaintiffs. (*see: McNary v. Haitian Refugee Center, Inc.*, 498 U.S. at 491-92 (1991)

I. 8 U.S.C. § 1252(a)(2)(B)(ii) DOES NOT PRECLUDE SUBJECT MATTER JURISDICTION

Section 1252(a)(2)(B)(ii) of title 8 of the United States Code states,

> ... no court shall have jurisdiction to review ... any ... decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under [8 U.S.C. § 1158(a), regarding asylum].

8 U.S.C. § 1252(a)(2)(B)(ii)

Thus, courts are precluded from exercising jurisdiction over cases where:
(1) there is a "decision or action" by the Attorney General or the Secretary of Homeland Security, and (2) subchapter II of chapter 12 of title 8 of the United States Code specifically provides authority for the Attorney General or Secretary of Homeland Security to take such action or make such decision in his or her discretion. Only if both of these distinct requirements are satisfied does 8 U.S.C. § 1252(a)(2)(B)(ii) bar jurisdiction.

The Petitioners herein contend that neither of these two requirements is met. The class action athletes alleged in their pleadings below that the United States Department of Homeland Security denial and revocation of their I-140 applications was accomplished pursuant to an unlawful targeting agenda. Thus, there was not a singular/particular "decision or action", but rather a series or group of

unlawful decisions or actions. The class members, like the class members in *McNary*, challenged the unlawful and unconstitutional practices and policies used to deny and revoke their I-140 applications. Under the interpretative canon *ejusdem generis* the words "decision" and "action" should be interpreted as having the same characteristics of meaning and finality. The class members Complaint alleging unlawful targeting exempts it from the jurisdictional bar of 8 U.S.C. § 1252 (a)(2)(B)(ii) under the Supreme Court holding in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

Furthermore, there is a strong presumption in favor of judicial review. *(see: Zafar v. U.S. Atty. Gen.*, 461 F. 3d 1357, 1361 (11th Cir. 2006) (citing *INS v. St. Cyr*, 533, U.S. 289, 298 (2001)). Because of this presumption, the courts may limit judicial review only upon a showing of "clear and convincing evidence" of legislative intent. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). Such a showing cannot be made here. Therefore, 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude jurisdiction.

II. CONGRESSIONAL INTENT

The jurisdiction bar at 8 U.S.C. § 1252(a)(2)(B)(ii) applies "in *only* the specific circumstances where the 'decision or action ... is *specified under this subchapter* to be in the discretion of the Attorney General....'" *Zafar v U.S. Atty. Gen.*, 461 F. 3d 1357, 1360 (11th Cir. 2006) (quoting 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis in the original)). The conjunctive **or** was put between "decision or action"

in the plain language of the statute by Congress and cannot be ignored. Or is defined as: a strict limited choice or division between only two options. Decision is defined as: a conclusion or resolution reached after consideration, the action of deciding. Action is defined as: something done, such as an act by a government body or government organization. Therefore, under 8 U.S.C. § 1252(a)(2)(B)(ii) there is no agency " decision or action" to trigger the bar, as the lawsuit that was dismissed by the district court was a class action lawsuit.

A. The plain meaning of "decision" or "action" in 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude a class action law suit

Congressional intent is apparent when the plain language and meaning of the statute is examined. If the "intent of Congress is clear, that is the end of the matter." *see: Scheerer v. United States Atty'y Gen.* 445 F.3d 1311, 1318-19 (11th Cir. 2006 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

B. "Decision" and " action" are interchangeable under *ejusdem generis* and by the use of the conjunctive or between the words

Here, the plain meaning of the work "action" does not include multiple class action claims. *see:* Black's Law Dictionary 28 (7th ed. 1999) (defining "action" as the "process of doing something" or a "thing done"). When Congress enacted 8 U.S.C. § 1252(a)(2)(B)(ii), it could have said 'decision(s) or action'; it could have

said 'decision or action(s)'; or it could have said 'decision(s) or action(s)'; but instead Congress said the singular "decision or action."

III. TWO CIRCUITS HAVE ACKNOWLEDGED THE PROBLEM WITH GIVING THE SECRETARY OF HOMELAND SECURITY UNBRIDLED DISCRETIONARY AUTHORITY

The Ninth Circuit in the case of *Ana International, Inc. v. Way,* 393 F.3d 886 (9th Cir. 2004) and the Third Circuit in the case of *LEI XU and LIANG LIU v. Michael Chertoff, et al,* 2007 U.S. Dist. LEXIS 50027 have found that district courts have subject matter jurisdiction to review an agencies failure to adjudicate applications "...within a reasonable time, ...(and) proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (2006). Furthermore, the APA mandates that a district court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1) (2006).

CONCLUSION

The case of *Ana International, Inc. v. Way, 393* F.3rd 886, in the Ninth Circuit contradicts the holding of the Eleventh Circuit in the instant case. *Ana International, Inc. v. Way, 393* F.3rd 886, holds that 8 U.S.C. §1252 (a)(2)(B)(ii) is not a bar to Federal Court review of I-140 revocations as revocations are not purely discretionary. The Eleventh Circuit holds that 8 U.S.C. § 1252(a)(2)(B)(ii)is a bar to Federal Court review as all I-140 revocations are discretionary.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 15, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:08-cv-21371 - CIV -
JORDAN/MCALILEY

LEEVAN SANDS, GABOR MATE, CLAUDIA DEL POZO, KARL THANING, NICHOLAS FOLKER, HEATHER BRAND MIHALY FLASKAY, SVETLANA KARPEEVA and ANNA NYIRY

Plaintiffs,

vs.

US DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP & IMMIGRATION SERVICES, et al

Defendants.
_____/

SECOND AMENDED COMPLAINT

INTRODUCTION:

1. This action is brought by the above-stated Plaintiffs, to compel the Defendants to adjudicate, pursuant to statute, the Immigrant Petitions for Alien of Extraordinary Ability in amateur athletics (1-140), filed by the Plaintiffs under §203(b)(1)(A) of the Immigration and Nationality Act.

2. The Plaintiffs are members of a class of amateur athletes that have had their I-140 applications denied (Del Pozo, Thaning, Folker, Brand, Flaskay, Karpeeva and new class member, Nyiry) or have been threatened with revocation (Sands and Mate). Lead class member, Leevan Sands, declares Miami, Florida as his residence.

3. Defendant Officer 1014 and Defendant David L. Roark are Officers with the Department of Homeland Security, Texas Service Center, Mesquite, Texas and are Federal law enforcement officers charged by law with the duty and obligation of adjudicating 1-140 petitions pursuant to §203 (b)(1)(A) of the Immigration and nationality Act.

JURISDICTION:

4. The Federal Court has jurisdiction of this cause in that unlawful acts of Officers of the Department of Homeland Security can be reviewed and corrected by the Federal Courts.

5. Subject matter jurisdiction is also requested under 8 U.S.C. §1329, (Immigration and Nationality Act), 28 U.S.C. §1331, §1361 (Federal Question) (Mandamus), and 5 U.S.C. §555(b), §706(1)(Administrative Procedure Act). This Court has supplemental jurisdiction over all other claims asserted in this action under 28 U.S.C. §1367(a) because they are so related to the claim asserted against the Defendants that they form part of the

same case or controversy under Article III of the United States Constitution.

6. Plaintiffs further request jurisdiction under the Administrative Procedure Act, 5 U.S.C. §555(b), §706(1) and 28 U.S.C. §1331.

7. Injunctive relief is requested under FRCVP 23, FRCVP 65 and the holding of *Haitian Refugee Center v. Nelson,* 694 F. Supp. 864 (S.D. Fla. 1988).

8. Costs and attorney's fees are requested pursuant to the Equal Access to Justice Act, 5 U.S.C. §504 and 28 U.S.C. §2412.

CLASS ACTION:

9. Historically, there have been 12 revocations of approved I-140 applications filed by amateur athletes and all represented by the undersigned attorney. *See Sibley v. U.S. DHS,* 07-21309-Civ-Cooke. There are two revocations pending on class members Sands and Mate. It has been alleged in Federal Court actions filed in the Miami District that all the I-140 applications presented to the Defendants by the amateur athletes and represented by the undersigned attorney are targeted for denial and revocation by the Defendants. *See Jayme v. U.S. DHS,* 07-23022-Seitz and *Tjin-A-Tam v. U.S. DHS,* 05-23339-Civ-Cooke. The class herein is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the claims of the representative parties are typical of the claims of the class and the named class members

will fairly and adequately protect the interests of the class.

ARGUMENT IN REGARD TO UNLAWFUL ACTS:

10. Of the 12 revocations to date, Defendant Officer 1014 has been the Officer that **ordered** revocation #11 and #12. Defendant Officer 1014 is also the Officer on the Mate and Sands revocations that are pending with the Defendants.

11. There are two triple denials by Defendant Officer 1014. That is, Defendant Officer 1014 denies three I1-40 applications for amateur athletes in one day. *See Sibley:* DE 25, DE 50-60. On April 30, 2008, pursuant to the targeting agenda, Defendant Officer 1014 denied five I-140 applications filed by amateur athletes and all represented by the undersigned. On May 1, 2008, Defendant Officer 1014 denied the sixth I-140 application filed by class Plaintiff, Karpeeva. (see Exhibit 1-6) On May 14, 2008, Defendant Officer 1014 denied the seventh I-140 filed by class Plaintiff, Nyiry. (see Exhibit 9).

12. Defendant Officer 1014 denied all the seven I-140 applications by failing to follow the plain language of the statute. §203(b)(1)(A) of the Act has three parts: "An alien is described in the (Act) if (I) the alien has extraordinary ability in ...athletics which has been demonstrated by **sustained national or international** acclaim ... (ii) the alien seeks to enter the United States to continue **work** in the area of extraordinary ability, and (iii) the alien's

entry...will substantially benefit prospectively the United States." (Emphasis added) The plain language of the Act in regard to (I) and (ii) is examined and explained in the case of *Buletini v. INS*, 860 F. Supp., 1222 (E.D.. Mich 1994). *Buletini* holds that the plain language of the statute is just what it says: "national or international acclaim." Defendant Officer 1014 fails to apply fact to law and fails to follow the plain language of the statute in the five denials of April 30, 2008 and the sixth of May 1, 2008, and the seventh of May 14, 2008. For example: in the Flaskay denial Defendant Officer 1014 fails to understand or comprehend that Plaintiff Flaskay has been five time Hungarian national champion and national record holder in swimming; United States national champion; that he has sustained his acclaim both nationally and internationally by silver and bronze awards in the European championships and the World championships; and that he is on the Hungarian Olympic team to complete at the Olympics in China. (see Exhibit 7, Coach Salo, Ph.D. expert opinion and analysis) All members of the class without exception are many time national champions of their home country.

13. Defendant Officer 1014 fails to follow the plain language of the statute by ignoring the meaning that the statute gives to "national acclaim." Defendant Officer 1014 has been advised many times of the plain language of the statute by experts in the field and the AAO. (see Exhibit 8, expert opinion and analysis of Coach Ableman as an example) Therefore, by failing to follow the plain language of the statute, Defendant Officer 1014 is engaging in

unlawful acts. These unlawful acts may be caused by a lack of understanding, an inability to be objective or a bias or prejudice, but they are nonetheless, unlawful.

14. Also in the Flaskay, Folker, Brand, Thaning, Karpeeva and Nyiry denials, Defendant Officer 1014 fails to follow the plain language of the statue by insisting that the swimmers must swim for a living. In all of history no swimmer has ever made a living from swimming. No swimmer has ever been paid to exhibit his or her stroke. Johnny Weismuller and Ester Williams come to mind, however, they were actors that swam in their movies. Defendant Officer 1014 states in the swimmer denials: "...it is reasonable to require evidence that the...(swimmer) will support himself primarily as a swimmer..."

This is an unlawful request as it does not exist in reality. Swimmers, swim, that is their work. The AAO has recently affirmed this plain language of this statute.

15. Congress included "athletes" in the statute. If it was Congressional intent to exclude amateur athletes from the statute, it would be in the plain language of the statute. Amateur athletics in the U.S. is huge and very popular, e.g. NCAA sports. Also, the Olympic games are primarily made up of amateur sports. Swimming at the Olympics is #3 in popularity.

PRELIMINARY INJUNCTION:

16. The class Plaintiffs respectfully request a Preliminary Injunction pursuant to FRCVP 65 as irreparable damage will be done to them if the Defendants do not immediately address the unlawful acts of Defendant Officer 1014.

TEMPORARY RESTRAINING ORDER:

17. If the unlawful acts of Defendant Officer 1014 are not brought to an immediate end, all the class members will be subjected to deportation, loss of work card, loss of travel permission and loss of statutory benefits.

REQUEST FOR RELIEF:

WHEREFORE: The Plaintiffs requests that the Court take subject matter jurisdiction of the case and set this matter for hearing on the request for Preliminary Injunction and the Temporary Restraining Order.

Respectfully submitted this **20th day of May, 2008.**

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By: *s/Charles J. Sibley*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:08-cv-21371 -
CIV/JORDAN/MCALILEY

LEEVAN SANDS, GABOR MATE,
CLAUDIA DEL POZO, KARL THANING,
NICHOLAS FOLKER, HEATHER BRAND
MIHALY FLASKAY, EVETIANA KARPEEVA
and ANNA NYIRY

Plaintiffs,

vs.

US DEPARTMENT OF HOMELAND SECURITY,
CITIZENSHIP & IMMIGRATION SERVICES
by and through DHS Secretary and
USCIS Director, OFFICER #1014 and
DAVID L. ROARK, Director - Texas Service Center

Defendants.

_____/

Certificate of Service

I hereby certify that on **May 20, 2008**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing

generated by CM/ECF or in some Other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/*Charles J. Sibley*

B 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 08-21371-CIV-JORDAN

LEEVAN SANDS, GABOR MATE, CLAUDIA DEL POZO, KARL THANING, NICHOLAS FOLKER, HEATHER BRAND, MIHALY FLASKAY,EVETIANA KARPEEVA, and ANNA NYIRY

Plaintiffs/Petitioners
vs.

U.S. DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES, by and through DHS SECRETARY and USCIS DIRECTOR, OFFICER 1014, and DAVID L. ROARK, Director, Texas Service Center

Defendants/Respondents

ORDER GRANTING MOTION TO DISMISS AND CLOSING CASE

The plaintiffs filed this action to compel the defendants to adjudicate the Immigration Petitions for Aliens of Extraordinary Ability (Form I-140), filed under 8 U.S.C. § 1103, (§ 203(b)(1)(A) of the Immigration and Nationality Act (INA)). The plaintiffs filed their complaint on May 12, 2008, and

thereafter filed an amended complaint on May 13, 2008. The plaintiffs subsequently filed a second amended complaint on May 20, 2008. The government argues that the second amended complaint should be stricken because the plaintiffs did not seek or obtain their written consent or the court's leave in violation of Rule 15(a)(2). The second amended complaint, however, is substantively similar to the amended complaint, except that it adds another plaintiff, Anna Nyiry. The legal analysis is the same regardless of which complaint I consider, and so, I elect therefore do not consider the initial complaint or the first amended 1 complaint. *See Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) ("As a general matter, an amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.") (internal citations omitted) to consider and address the second amended complaint.1

For the reasons which follow, the defendants' motion to dismiss [D.E. 13] is GRANTED. The second amended complaint is dismissed for lack of jurisdiction.

I. FACTS

The plaintiffs are amateur athletes who fall in two groups. Plaintiffs Del Pozo, Thaning, Folker, Brand, Flaskay, and Karpeeva have had their I-140 applications denied, and plaintiffs Sands and Mate have been threatened with revocation of their

approved I-140 petitions. The plaintiffs assert that Defendant Officer 1014 failed to follow the plain language of the applicable statute, and failed to apply the facts to the law, in denying the I-140 petitions, thereby engaging in unlawful acts. The plaintiffs seek a preliminary injunction and a temporary restraining order against the alleged acts of Defendant Officer 1014. The plaintiffs assert jurisdiction under 8 U.S.C. § 1329 (the INA), 28 U.S.C. § 1361 (the mandamus statute), 28 U.S.C. § 1331 (federal question jurisdiction), 5 U.S.C. § 555(b) (the Administrative Procedure Act), and 28 U.S.C. § 1367(a) (supplemental jurisdiction). The government has moved to dismiss, arguing that there is no subject matter jurisdiction. The plaintiffs' response utterly fails to address the government's jurisdictional arguments. The plaintiffs instead have made a frivolous argument, unsupported by any authority, that the U.S. Attorney's Office must be disqualified from representation of the defendants. That request for disqualification is denied.

II. SUBJECT MATTER JURISDICTION

A federal court is under an independent obligation to determine whether subject-matter jurisdiction exists. *See, e.g., Cadet v. Bulger*, in the complaint and view any evidence submitted by the 377 F.3d 1173, 1179 (11th Cir. 2004). If there is no subject-matter jurisdiction, the case must be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). In making this determination, I may look beyond the allegations parties to determine whether jurisdiction exists. *See Lawrence v. Dunbar*, 919 F.2d

1525, 1529 (11th Cir. 1990). The plaintiffs' proposed jurisdictional bases are discussed below.

A. THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. § 1329)

The plaintiffs assert jurisdiction under to the INA, 8 U.S.C. § 1329. Historically, a court's jurisdiction to review the grant or denial of visa petitions to aliens was found within the INA. In 1996, Congress enacted the Intelligence Reform and Responsibility Act (IIRIRA), which amended 8 U.S.C. § 1329 to repeal judicial review of such suits. In relevant part, § 1329 now states that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, *brought by the United States* that arise under the provisions of this subchapter . . . . Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers." *See* 8 U.S.C. § 1329 (emphasis added). Therefore, the plaintiffs reliance on the INA for purposes of subject-matter jurisdiction in this case is misplaced because § 1329 only confers jurisdiction if the action is brought by the United States. Moreover, there is clear language expressing that it does not provide jurisdiction for suits against the United States, its agencies, or officers. *See Jayme v. United States Dept. of Homeland Sec.*, 2008 WL 1885797, at *1 (S.D. Fla. Apr. 28, 2008) (citing *Ghergel v. United States Dept. of Homeland Sec.*, Case No. 06-20002-Highsmith, March 12, 2008 [D.E. 20]). *Jayme* and *Ghergel* each involved similar I-140 disputes and both courts held that the plain language of § 1329 precluded reliance

on the INA for subject matter jurisdiction. In addition, Congress recently amended the INA by adding § 1252(a)(2)(B)(ii), which provides as follows:

Notwithstanding any other provision of law . . . no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum] relief under section 1158(a) of this title. 8 U.S.C. § 1252(a)(2)(B)(ii). The § 1252(a)(2)(B)(ii) jurisdictional bar precludes judicial review of discretionary decisions made under §§ 1151-1378 of the INA. *See Yerkovich v. Ashcroft*, 381 F.3d 990, 992 (10th Cir. 2004) ("the phrase 'this subchapter' refers to 8 U.S.C. §§ 1151- 1378"). The Attorney General's authority to grant or deny visas to aliens of extraordinary ability in the field of athletics arises from 8 U.S.C. § 1153(b)(1)(A), and the authority to revoke such visas arises under § 1155. Such authority is discretionary, as explained later. As a result, § 1252(a)(2)(B)(ii) therefore I am aware of *Tjin-A-Tam v. United States Dep't of Homeland Sec.*, 2007 WL 2377047 2 (S.D. Fla. 2007), but that decision merely issued a stay and did not hold that there was jurisdiction. Even if the plaintiffs satisfied both prongs of the mandamus requirements, "only the courts of appeal retain jurisdiction to consider constitutional and legal challenges to decisions pertaining to the denial of discretionary relief, such as the one presented in the instant mandamus petition." *See Sillah v. Lara*, 275 Fed. Appx. 822, 824

(11th Cir. 2008). The mandamus statute therefore apparently does not provide an independent ground for jurisdiction. *See United Petro/Energy Corp. v. United States*, 846 F. Supp. 993, 996 (S.D. Fla.1994) (citing *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 459 (9th Cir.1977)) precludes judicial review of this case. Judges in this district have consistently declined review of discretionary USCIS action, especially in cases involving I-140 petitions. *See Gringberg v. Swacina*, 478 F. Supp. 2d 1350, 1352 (S.D. Fla. 2007) (following majority rule in dismissing request for judicial review of USCIS action in light of §1252(a)(2)(B)(ii) jurisdictional bar); *Jayme*, 2008 WL 1885797, at *2 (court lacked jurisdiction to review I-140 visa determination); *Gherghel*, No. 06-20002-Highsmith, March 12, 2008 [DE-20] (same).2

B. MANDAMUS JURISDICTION (28 U.S.C. § 1361)

Under § 1361, district courts have original jurisdiction over a mandamus action "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *See* 28 U.S.C. § 1361. "Mandamus jurisdiction is an extraordinary remedy which should only be utilized in the clearest and most compelling of cases." *See Cash v. Barnhart*, 327 F.3d 1252, 1257 (11th Cir. 2003). Mandamus jurisdiction arises only in cases where "(1) the defendant owes a clear nondiscretionary duty to the plaintiff and (2) the plaintiff has exhausted all other avenues of relief." *See Life Star Ambulance Serv., Inc., v. United States*,

365 F.3d 1293, 1295 (11th Cir. 2004). The plaintiffs fail to meet the first prong because revocation of I-140 petitions is a discretionary act. *See Jayme,* 2008 WL 1885797, at *2 (citing *Ghanem v. Upchurch*, 481 F.3d 222, 224 (5th Cir.2007)). I therefore need not address the second prong.3

C. FEDERAL QUESTION JURISDICTION (28 U.S.C. 1331)

Contrary to the plaintiffs' assertion, 28 U.S.C. § 1331 provides no independent basis for subject matter jurisdiction. *See St. Andrews Park, Inc. v. Dep't of Army Corps of Eng'rs*, 314 F. Supp. 2d 1238, 1242 (S.D. Fla. 2004) (citing *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984)). Instead, an independent federal statutory or constitutional basis must exist to satisfy federal question jurisdiction. *See id.* As no viable statutory or constitutional basis exists in the instant matter, federal question jurisdiction does not exist.

D. THE ADMINISTRATIVE PROCEDURE ACT (5 U.S.C. § 555(b))

The Administrative Procedure Act (APA) does not provide a court with an independent basis for subject-matter jurisdiction. *See Califano v. Sanders,* 430 U.S. 99, 107 (1977) ("We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."). *See also Your Home Visiting Nurse Servs., Inc. v. Shalala,* 525 U.S. 449, 457-58 (1999). If at all, subject-matter jurisdiction is proper

under the APA only in combination with a court's federal question jurisdiction under § 1331. *See Grinberg,* 478 F. Supp. 2d. at 1355. Although there is a presumption in favor of judicial review of agencyaction, that presumption may be overcome if the statutory scheme indicates that Congress intended to preclude such review. *See Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 349 (1984). Here, §1252(a)(2)(B)(ii) plainly expresses that no judicial review of the Secretary's discretionary revocation decision is intended, thus precluding jurisdiction under the APA. *See Grinberg,* 478 at F. Supp. 2d at 1355. Because there is no other basis for jurisdiction here, the APA is inapplicable and does not afford an independent basis for jurisdiction.

E. SUPPLEMENTAL JURISDICTION (28 U.S.C. § 1367)

As the government correctly argues, § 1367 grants a court supplemental jurisdiction only where the court has original subject matter jurisdiction. *See Jayme,* 2008 WL 1885797, at *3. Because there is no original jurisdiction over any aspect of the case, supplemental jurisdiction does not arise. *See Scarfo v. Ginsberg,* 175 F.3d 957, 962 (11th Cir. 1999).

III. CONCLUSION

Accordingly, the defendants' motion to dismiss for lack of jurisdiction is **GRANTED**, and this case is **DISMISSED**. Any and all pending motions,

including the motions for injunctive and emergency relief [D.E. 8, 29], are **DENIED AS MOOT**.

This case is **CLOSED. DONE** and **ORDERED** in chambers in Miami, Florida, this 10th day of September, 2008.

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Adalberto Jordan
United States District Judge
Copies to: All counsel of record

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Filed: January 26, 2009
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15370
Non-Argument Calendar

D.C. Docket No. 08-21371-CV-AJ

LEEVAN SANDS,
GABOR MATE,
CLAUDIA DEL POZO,
KARL THANING,
NICHOLAS FOLKER,
HEATHER BRAND,
MIHALY FLASKAY, et al.,

Plaintiffs-Appellants,

versus

U.S. DEPARTMENT OF HOMELAND SECURITY,
Citizenship and Immigration Services by and through DHS Secretary and USCIS Director Officer 1014,
DAVID ROARK
Director Texas Service Center,
ATTORNEY GENERAL OF THE UNITED STATES,
USDOJ, Attorney General,
TEXAS SERVICE CENTER OFFICER 1014,

Defendants-Appellees.

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Appeal from the United States District Court for the Southern District of Florida

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(January 26, 2009)

Before HULL, PRYOR and COX, Circuit Judges.

PER CURIAM:

Leevan Sands and others filed this putative class action against the United States Department of Homeland Security, Citizenship and Immigration Services, and various officers of these agencies. The class the Plaintiffs seek to represent consists of amateur athletes who have had their I-140 applications (filed under 8 U.S.C. § 1103) denied or revoked, and amateur athletes whose § 1103 applications the Defendants threaten to revoke. The Second Amended Complaint (the version of the complaint the district court addressed) alleges that this action was filed "to compel the defendants to adjudicate" their petitions. (R.2-35 at 1.) It is clear from the complaint, however, that what Plaintiffs seek is a *favorable* adjudication. The complaint does not allege that the Defendants have failed to act, or that there has been unreasonable delay in action on the applications. What is complained of is denial of applications, revocation of applications and threats to revoke applications.

The Second Amended Complaint asserts jurisdiction under 8 U.S.C. § 1329 (the INA), 28 U.S.C. § 1361 (the mandamus statute), 28 U.S.C. § 1331 (federal question jurisdiction), 5 U.S.C. § 555(b) (the Administrative Procedure Act), and supplemental jurisdiction under 28 U.S.C. § 1367(a). The Defendants moved to dismiss, asserting that the court lacked subject matter jurisdiction. The Plaintiffs' response did not address the Defendants' jurisdictional arguments.

The district court granted the motion to dismiss. (R.2-35 at 1-5.) The court concluded that none of the grounds for subject matter jurisdiction alleged in the complaint supported the Plaintiffs' complaint. Additionally, the court held that the jurisdiction-stripping provisions of the INA contained in 8 U.S.C. § 1252(a)(2)(B)(ii) bar judicial review of discretionary decisions made under 8 U.S.C. §§ 1151-1378 of the INA.

The district court's order (R.2-35 at 1-5) carefully considered each of the bases for jurisdiction in the district court alleged by the Plaintiffs, and correctly concluded that none of them supported jurisdiction to review discretionary decisions to deny visas to aliens of extraordinary ability in the field of athletics under 8 U.S.C. §1153(b)(1)(A) or to review revocations of such visas under 8 U.S.C. § 1155.

The district court carefully concluded that 28 U.S.C. § 1361, the mandamus statute, provides no basis for jurisdiction because the action complained of is discretionary. (R.2-35 at 4.) The court could have also

bottomed this conclusion on 8 U.S.C. § 1252 (a)(2)(B), which explicitly strips the district court of jurisdiction under the mandamus statute. The jurisdiction-stripping statute provides: (B) Denials of discretionary relief Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review). . .(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title. 8 U.S.C. § 1252(a)(2)(B)(ii). The phrase "this subchapter" includes 8 U.S.C. §§ 1153(b)(1)(A) and 1155.

The district court's dismissal for want of subject matter jurisdiction is affirmed.

AFFIRMED.